

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CORTEZ LEE CUNNINGHAM,

Defendant-Appellant.

UNPUBLISHED

January 9, 1998

No. 196032

Recorder's Court

LC No. 95-007486

Before: McDonald, P.J., and Saad, and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529; MSA 28.797, assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to two years' imprisonment for the felony-firearm conviction, such sentence to be followed consecutively by concurrent terms of twenty to forty years' imprisonment for the armed robbery conviction and eighty to 120 months' imprisonment for the assault conviction. Defendant appeals as of right. We affirm.

Defendant's convictions arise out of the armed robbery of the complainant by defendant, Falana Renita Higgins and another male accomplice. Following the robbery, someone shot the complainant.

We first consider the issues raised in the brief filed by defendant's appellate counsel. Specifically, defendant argues that the trial court erred in permitting the complainant to testify to statements Higgins made during the course of the robbery. Defendant contends that this testimony constituted inadmissible hearsay because the requirements for admission of the statements as statements of a coconspirator were not met. See MRE 801(d)(2)(E). We disagree.

The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Phillips*, 217 Mich App 489, 497; 552 NW2d 487 (1996). "A statement is not hearsay if . . . (2) [t]he statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy." MCR 801(d)(2)(E). Independent proof of the

conspiracy must be shown by a preponderance of the evidence. *People v Moscara*, 140 Mich App 316, 319; 364 NW2d 318 (1985). The conspiracy may be established by circumstantial evidence and may be based on inferences. *Id.*

In this case, the evidence, exclusive of Higgins' statements, leaves little doubt that defendant, Higgins, and another man conspired to rob the complainant. Specifically, the testimony indicated that the complainant was only recently acquainted with Higgins. When Higgins rang his doorbell in the middle of the night, the complainant let Higgins into his apartment. While Higgins was in the kitchen alone, she let defendant and the other robber into the complainant's apartment. Then Higgins, defendant, and the other robber rushed into the complainant's bedroom together. Defendant went into complainant's room first, with a gun in his hand, yelling at complainant to stay down or defendant would shoot him. We conclude that a conspiracy was independently established by a preponderance of the evidence. In addition, Higgins' statements were made during the course of and, because they facilitated the commission of the robbery, in furtherance of the robbery. *People v Bushard*, 444 Mich 384, 395; 508 NW2d 745 (1993) (Boyle, J. with Griffin, J.). Accordingly, the statements were admissible under MRE 801(d)(2)(E).

Next, defendant argues that his assault conviction must be reversed because the prosecution failed to present sufficient evidence either that he shot the complainant or that he aided and abetted the shooting of the complainant. We disagree.

When reviewing a claim of insufficient evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Kozyra*, 219 Mich App 422, 428; 556 NW2d 512 (1996). The credibility of the witnesses is the function of the jury, not the reviewing court. *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997).

To prove that a defendant aided and abetted the commission of a crime the prosecutor must establish that (1) the crime was either committed by the defendant or some other person; (2) the defendant performed acts or encouraged or assisted the principal in committing the crime; and; (3) the defendant intended the commission of the crime, or had knowledge that the principal intended its commission at the time the defendant gave aid and encouragement. *People v Jones (On Rehearing)*, 201 Mich App 449, 451; 506 NW2d 542 (1993).

In this case, even assuming that defendant was not the shooter, there is no question but that someone returned and shot the complainant. The evidence in the case indicated that only one gun was used to commit the robbery and assault. Defendant's own statement indicated that the other male robber initially possessed the gun but gave the gun to defendant. The complainant testified that defendant held the gun to the complainant's head during the entire incident and threatened to shoot the complainant if the complainant moved or did not tell the robbers where money was hidden. While defendant held the gun to complainant's head, Higgins repeatedly stated that they would have to kill the complainant because the complainant knew who she was. Defendant's statement indicates that at some point he gave the gun back to the other male robber. Viewing this evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found (1) that defendant assisted the

principal in the subsequent shooting of the complainant, and; (2) that defendant knew the principal possessed the requisite intent when defendant gave his assistance. *People v Pena*, 224 Mich App 650, 659; 569 NW2d 871 (1997); *Jones, supra*; see also MCL 750.84; MSA 28.279. Thus, defendant's assault conviction was supported by sufficient evidence.

Next, defendant argues that the trial court erred when it refused to give the jury defendant's requested alibi instruction. We agree that the trial court erred in refusing to instruct the jury regarding the defense of alibi. However, we conclude that the error was harmless.

This Court reviews jury instructions as a whole. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). Even if there are some imperfections, there is no basis for reversal if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.* Alibi testimony is defined as testimony offered for the sole purpose of placing a defendant elsewhere than at the scene of the crime. *People v McGinnis*, 402 Mich 343, 345; 262 NW2d 669 (1978). A defendant's general denial of the charges against him does not constitute an alibi defense. *Id.* at 346. However, if a defendant gives specific testimony regarding his whereabouts at the time in question, it is alibi testimony. *Id.* In general, if a defendant requests an alibi instruction, it must be given. *Id.* at 345. However, even when warranted, the failure to give an alibi instruction may be harmless error. *People v Matthews*, 163 Mich App 244, 249-250; 413 NW2d 755 (1987).

In this case, defendant gave notice that he was going to present alibi evidence. Although his alibi witnesses did not show up at trial, defendant testified that at the time of the robbery he was not present at the scene of the crime but rather was at "8980 Vinton," a place that he was staying. Thus, defendant did give specific testimony concerning his whereabouts at the time in question. In light of the general rule that an alibi instruction must be given when requested, the trial judge erred in refusing to give the jury an alibi instruction. *McGinnis, supra*.

Preserved nonconstitutional error requires reversal only when the error was prejudicial. *People v Belanger*, 454 Mich 571, 576; 563 NW2d 665 (1997). The reviewing court is to examine the record as a whole and the actual prejudicial effect of the error on the factfinder in the case at hand. *People v Mateo*, 453 Mich 203, 206; 551 NW2d 891 (1996). Our Supreme Court has reserved the question of the level of assurance that a reviewing court must have that a preserved nonconstitutional error was not prejudicial. *Belanger, supra*; *People v Humphreys*, 221 Mich App 443, 448; 561 NW2d 868 (1997). However, in determining the harmlessness of preserved nonconstitutional error, this Court has utilized the "highly probable" test, *Humphreys, supra*, the "more probable than not" test, *id.*, the "reasonable probability" test, *People v Sabin*, 223 Mich App 530, 540; 566 NW2d 677 (1997), and the "inconsistent with substantial justice" test, *People v Huyser*, 221 Mich App 293, 299; 561 NW2d 841 (1997). In any event, in *Mateo*, our Supreme Court indicated that "[t]hose courts denying relief because the preserved error had only slight or negligible influence on the verdict have proceeded correctly." *Id.* at 221.

In this case, defendant's primary theory at trial, and his strongest theory in light of the evidence in this case, was misidentification. However, the jury rejected this theory and found that defendant was one of the perpetrators. Defendant's own statement to the police put him at the scene of the crime.

Under these circumstances, we conclude that the absence of the alibi instruction had only a slight or negligible influence on the verdict and was, therefore, harmless. *Mateo, supra* at 221; cf *Matthews, supra* at 249-250.

Finally, defendant in propria persona raises two issues. First, we conclude that defendant's confession was voluntary. *People v Howard*, ___ Mich App ___; ___ NW2d ___ (Docket No. 172633, issued 11/25/97), slip op p 7. Accordingly, the trial court did not err in refusing to suppress defendant's confession on this basis. *Id.* Second, after reviewing the record, we conclude that defendant has failed to establish that defense counsel so erred that defendant was denied a fair trial. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). Thus, defendant has failed to establish that he was denied the effective assistance of counsel. *Id.*

Affirmed.

/s/ Gary R. McDonald
/s/ Henry William Saad
/s/ Michael R. Smolenski